No. 87-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT ANDERSON, JR., *et al*
Petitioners,

v.

SLATTERY GROUP, INC., *et al*
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

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I.

Another circuit joins the Sixth Circuit in conflict with the Eighth Circuit, enhancing the need for a uniform approach amongst the circuits

Three weeks before the respondents filed their reply to the petition for a writ, the Eleventh Circuit in *United Steelworkers v. Connors Steel Co.*, 847 F.2d 707 (11th Cir. 1988) ("*Connors*"), expressly adopted the views of the Sixth Circuit both in approach and in the interpretation of formal plan provisions similar to those in the instant case. The termination clause

in *Connors* was as broad as and certainly more inclusive than the duration clause in the instant plan. The Eleventh Circuit did not find the termination clause "inconsistent" with an intent to vest. Rather, it agreed with the Sixth Circuit's demand that for a duration clause to be construed as the Eighth Circuit does, the clause would be required to expressly refer to the duration of *benefits*.[1]

The Eleventh Circuit in *Connors* also agreed that under the decided cases involving retiree insurance benefits it is not unique for such benefits to continue after expiration of the labor agreement, thus joining in the conflict with the Eighth Circuit's holding that by law and custom such benefits cannot be expected to continue beyond the term of the labor agreement. In further conflict with the Eighth Circuit, the Eleventh Circuit also held a plan provision allowing amendment is not inconsistent with a vesting intent. The Eleventh Circuit did not find the written expression that benefits will continue "except as the company and the union may agree otherwise," a statement inconsistent with any vesting intent.

The Eleventh Circuit in *Connors* also said that meaning be given to other clauses that do say when benefits terminate. There were such clauses in the instant case, yet the trial court did not use them for analysis and the appeals court ignored them in its analysis.

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[1] On page 9 of their memorandum respondents urge that a vague reference in the 1978 SPD to a collective bargaining agreement, constitutes unequivocal disclosure that the labor agreement's termination clause applies to all plan benefits. That vague reference does not meet the requirements of 29 U.S.C. §1022(b) ("a description of the relevant provision of any applicable collective bargaining agreement"). Nor does it meet the Secretary's regulations cited in the petition for the writ at note 5, page 15. The Courts below did not suggest this SPD reference meaningful or in compliance with ERISA.

II.

Respondents assert evidence the lower court decisions never found. No evidence was found of unequivocal disclosure of respondents' non-vesting intent prior to respondent's 1981 decision to terminate

Respondents on page 6 argue that because there was no explicit finding by the lower courts expressly stating the drafters' intent was undisclosed, it must be presumed that there was disclosure. No evidence was offered at trial respondents disclosed their intent before the 1981 termination decision, beyond the documentation to which the courts below made reference.[2]

The lower courts found no objective acts of disclosure not discussed in the petition for the writ. The petition for the writ noted the lower courts did view the mid-60's negotiation of coordination of benefits with Medicare as objective evidence by which they concluded the retirees should have understood their benefits were not vested. In evaluating the evidence the courts below ignored the then-current practice to allow labor unions to bargain for retirees as a mandatory subject of bargaining, a practice rejected six years later in *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176 (1971). Respondents' documented and uncontested notice to retirees of that mid-60's coordination, told retirees that "coverage will be greater under the coordinated plans and in no event will it by any less than your present company coverage," exhibit 466, on

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[2] Respondents on page 8 purport a 1977 document which neither of the courts below even considered relevant or found had been sent to anyone. Petitioners denied receipt. There was no evidence it was filed with the Secretary under 29 U.S.C. §1021(a)(1). The document respondents appear to refer to is incomprehensible unless one pulls a phrase out of context. The courts below found only one SPD to exist, and that was found to be "faulty" because it indicated that the benefits continued for life, which was found contrary to the drafters' intent.

the basis of which the courts below attirbuted to retirees the understanding that their benefits were subject to reduction and were therefore transitory. See respondents' brief at 3 n.2.[3]

III.

The instant case raises trust questions

This Court determined unequivocally that ERISA plans are to have an "equitable character." *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985). One such equitable principle the review by this Court in the *Firestone Tire & Rubber Co. v. Bruch*, docket No. 87-1054, will entail, if trust law is to be applied to ERISA contract violations, is the deter-

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[3] On that same page of its brief respondents complain about a statement in the petition for the writ that "Alpha offered no testimony from any of its 1965 benefit negotiators." Respondents suggest that both lower courts found there was such testimony. Although the Eighth Circuit did refer to respondents' witnesses Bonstein and Loveridge as respondents' "negotiators" generally, that opinion does not find that either were *actual participants* in the specific 1965 benefit negotiations. Both respondents' witnesses Bonstein and Loveridge testified that they did not directly participate in the 1965 benefit negotiations. Respondents' own historical reports list their representatives present at the negotiations; not a single person listed testified. The district court in its opinion, A31, referred to a single "negotiating representative," but did not find that that representative — Loveridge — actually participated in face-to-face negotiations on benefits in 1965. At trial respondents' counsel conceded his non-presence but insisted that Mr. Loveridge should be allowed to testify as to his understanding because he was "copied on all the documents . . . and he was area coordinator." Trial transcript 3-38 lines 16-18. Thus the district court was constrained to rely upon what the respondents' negotiating representative "understood" the phrase "until death of retiree" to mean, A31, rather than on testimony as to what negotiators actually said.

Petitioners' petition for the writ does not propose need for reviewing this finding as to what respondents "understood." Respondents' attempt to create factual dispute for review suggests the wisdom of requiring disclosed objective, unequivocal evidence when the district court finds participants are told benefits continue until they die.

mination whether respondents' conduct is arbitrary and capricious. Ordinarily if the worker puts in the requisite years of service, then notwithstanding the employer's express reservation of a right to change benefits, it follows that the employee is entitled to receive retirement benefits. *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 5-6 (1st Cir. 1978), cert den'd 440 U.S. 913 (1979).[4]

Another essential aspect of ERISA trust law is that undisclosed intent is immaterial, contrary to respondents' apparent suggestion on page 6 that intent controls under trust law even if never disclosed in objective, unequivocal fashion.

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[4] The First Circuit in *Hoefel* recognized courts view retirement benefits as a form of "deferred compensation." 581 F.2d at 5. See also *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. at 180 ("future retirement [insurance] benefits are part and parcel of . . . overall compensation."). The First Circuit went on to note retirement benefits are offered by the employer "as a means of obtaining a more stable and productive work force." 581 F.2d at 5. This is consistent with that circuit's later decision *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519 (1st Cir. 1988), in which the court cited with approval *Duldulao v. Saint Mary of Nazareth Hosp.*, 505 N.E.2d 314, 319 (Ill. 1987) for saying: "There is no question but that plaintiff continued to work with knowledge of the handbook provisions. Under these circumstances the handbook's provisions became binding on the employer." 837 F.2d at 523.

Thus the First Circuit now appears to conflict with the Eighth Circuit as to what constitutes evidence of reliance. In the instant case workers would ratify the labor agreement only after asking about and receiving assurances that retirees' benefits were for life. Respondents issued the 1978 SPD continuing such assurance before the last ratification vote. The Eighth Circuit rejected this as evidence showing reliance.

CONCLUSION

The lower courts were quite specific as to what evidence they considered relevant and what conclusions they drew therefrom. There is no dispute as to the factual findings of the lower court as to what information was given to the workers. The instant case best frames the conflict between the Eighth Circuit and all the other circuits which have addressed the question of retirees' insurance benefits. If the Eighth Circuit is correct, it will save employers retiree health care costs estimated by the Congressional Select Committee on Aging to be anywhere from half a trillion to three trillion dollars, and with the same stroke either shift these costs to the taxpayer or make the older Americans do without the health care they were promised was for their lives. Review by this court is merited.

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